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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re WILLOW B., a Person Coming Under the Juvenile Court Law.	B277291 (Los Angeles County Super. Ct. No. CK80829)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KATHERINE A., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Stephen C. Marpet, Commissioner. Conditionally affirmed and remanded.

Ernesto Paz Rey, appointed by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sally Son, Senior Associate County Counsel, for Plaintiff and Respondent.

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A juvenile court exerted dependency jurisdiction over a then-two-year-old minor due to her mother's longstanding and persistent use of marijuana. Mother appeals, arguing that the court's decisions to exert jurisdiction and to remove the minor from her custody were not supported by substantial evidence. Mother also argues that the juvenile court did not comply with the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). We conclude that mother's challenges to the sufficiency of the evidence lack merit, but a conditional remand is required to ensure compliance with ICWA.

FACTS AND PROCEDURAL BACKGROUND

Katherine A. (mother) and Willie B. (father) have one child together, Willow B. (Willow) (born 2013).

The juvenile court had exerted dependency jurisdiction over mother's two older children, in part because mother beat one of the children with a broomstick until it broke and also hit that same child in the face. During those proceedings, mother consistently tested positive for marijuana and admitted to regularly smoking marijuana.

Soon after the Los Angeles Department of Children and Family Services (Department) learned that mother had given birth to Willow, the Department filed a petition asking the juvenile court to exert dependency jurisdiction over Willow on two grounds: (1) mother suffered from mental and emotional problems but was not taking her prescribed medications, and (2) mother had a "history of illicit drug abuse and is a current

abuser of marijuana." The petition alleged that each ground placed Willow at "substantial risk" of "suffer[ing] . . . serious physical harm or illness" within the meaning of Welfare and Institutions Code section 300, subdivision (b)(1)).[1]

Following a contested evidentiary hearing, the juvenile court exerted dependency jurisdiction over Willow. Because mother testified that she had resumed taking her prescribed medications, the court dismissed the first ground. However, the court found ample evidence to support the second ground. Mother had told Department officials she was smoking marijuana once or twice a day "to ease the pain." Her habits were confirmed by the drug testing ordered by the juvenile court: Mother failed to show for nine tests and tested positive for marijuana the three times she did show up. In light of mother's "long history of drug abuse" and Willow's young age, the court found that Willow faced substantial risk of serious physical harm.

The juvenile court also ordered that Willow be removed from mother's custody. Specifically, the court found that mother's drug abuse and her "long, long history losing children to the Department" put Willow's "physical and mental well-being" in "substantial danger." The court also found that "[t]here is no reasonable means [to] protect [Willow]" short of removal. Mother did not avail herself of the court's recommendation, six months earlier, to demonstrate her ability to forgo marijuana and obtain treatment; instead, she tested positive for marijuana whenever she showed up for testing and had signed up for treatment only in the past month.

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother filed a timely appeal.

DISCUSSION

I. Substantial Evidence

Mother challenges the sufficiency of the evidence underlying the juvenile court's jurisdictional and removal orders. In reviewing these claims, we view the record in the light most favorable to those orders and ask whether it contains evidence that is reasonable, credible, and of solid value sufficient for a reasonable trier of fact to enter the orders under review. (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

A. Jurisdiction

A juvenile court may exert dependency jurisdiction over a child if, among other things, the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of . . . her parent . . . to adequately supervise or protect the child." (§ 300, subd. (b)(1); *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) When the failure to supervise is based on drug abuse, courts employ a "tender years" presumption; under that presumption, a "finding of substance abuse is prima facie evidence of the inability of a parent . . . to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767; *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1385 (*Kadence P.*); *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1220.) In such cases, jurisdiction is appropriate even without proof of "an identified, specific hazard in the child's environment." (*Drake M.*, at pp. 766-767.) Because Willow was two years old at the time of the jurisdictional hearing (and is now only three years old), she is a child of tender years. Because there is substantial evidence of mother's marijuana abuse and

because Willow is a child of tender years, the presumption applies and constitutes sufficient evidence to support the juvenile court's exertion of dependency jurisdiction.

Mother points to evidence that Willow was happy in her home, did not have any marks or bruises, and had lived in her home without incident for two years prior to the Department's intervention. Because mother does not dispute the applicability of the tender years presumption, the absence of any "identified, specific hazard" does not undermine the juvenile court's jurisdictional finding. (Accord, *In re N.M.* (2011) 197 Cal.App.4th 159, 165 ["The [juvenile] court need not wait until a child is seriously abused or injured to assume jurisdiction"].)

B. Removal

A juvenile court may remove a child from the parent with whom she resides only if the court finds, by clear and convincing evidence, that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the [child] if the [child] were returned home, and there are no reasonable means by which the [child's health and safety] can be protected without removing the [child] from the . . . parent's . . . physical custody." (§ 361, subd. (c)(1); *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.) Although it remains unsettled whether our review for substantial evidence must take into account the clear and convincing evidence standard (compare *In re Ashly F.*, at p. 809 [applying higher standard on appeal] with *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492-1493 [disregarding higher standard on appeal]), we will sidestep the conflict by using the higher standard.

Substantial evidence supports the juvenile court's finding, by clear and convincing evidence, that Willow faced "substantial

danger" to her "health, safety, protection, or physical or emotional well-being" and that there were "no reasonable means" to protect her short of removal. Mother had demonstrated her unwillingness or inability to stop using marijuana—both during the prior dependency proceeding and during this one. As noted above, that drug abuse poses a substantial risk of serious physical harm to children of tender years. With respect to mother's other children, that risk was manifested.

Mother raises two arguments in response. First, she argues that the risk to Willow was mitigated by her participation in a treatment program. While that step is commendable, the juvenile court was entitled to give greater weight to mother's longstanding history of abuse, her failure to enroll in the program until a month before the jurisdictional hearing, and the absence of any evidence of mother's *progress* in that program. (See *Kadence P.*, *supra*, 241 Cal.App.4th at pp. 1383-1384 ["A parent's "'[p]ast conduct may be probative of current conditions" [particularly where] there is reason to believe that the conduct will continue"'].)

Second, mother contends that there were other means of protecting Willow, such as more intensive Department supervision of mother. For support, she cites *In re Henry V.* (2004) 119 Cal.App.4th 522. There, the court held that "unannounced visits and public health nursing services" provided "in home" are alternatives to removal, at least where the mother had been "fully cooperative in taking advantage of [those] services." (*Id.* at pp. 529-530.) Mother had not taken advantage of the Department's services, she failed every drug test she took, and only at the very last minute signed up for a drug treatment program. What is more, mother had evaded one visit by a

Department official by pretending to be her own cousin and had also disappeared from Department supervision for "several months." In light of mother's prior conduct, the juvenile court had an ample basis for finding that no means short of removal could assure Willow's safety.

II. ICWA Compliance

Mother argues that the juvenile court erred in not ordering the Department to notify the Cherokee Indian tribe of Willow's potential status as an "Indian child" within the meaning of ICWA. Because the threshold for determining whether notice is required is a factual question, our review is for substantial evidence. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467 (*Hunter W.*).)

ICWA was enacted to address "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement." (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) To this end, ICWA, and the California statutes that implement ICWA, impose several duties upon dependency courts. One of these duties is to "notify" (1) "the parent or Indian custodian," and (2) either (a) "the Indian child's tribe," if it is known, or (b) the Secretary of the Interior and the Bureau of Indian Affairs, if the tribe is unknown whenever "the court knows or has reason to know that an Indian child is involved" in a proceeding. (25 U.S.C. § 1912(a); see also 25 U.S.C. § 1903(11); §§ 224.2, subd. (a)(4) & 224.3, subd. (d).) A child is an "Indian child" if he or she is either (1) "a member of an Indian tribe," or (2) "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); § 224.1, subd. (a).) The determination of whether a child is an Indian child lies

exclusively with the tribe; the statutorily required notice enables the tribe to make that decision. (§ 224.3, subd. (e)(1); *In re Breanna S.* (2017) 8 Cal.App.5th 636, 654-655.) Therefore, even evidence "suggesting" a minor "may" have Indian heritage meets the "very low" bar to trigger the court's duty to issue ICWA notice. (*In re D.C.* (2015) 243 Cal.App.4th 41, 60; § 224.3, subd. (e)(1).)

The juvenile court in this case ruled that it had "no reason to know" that Willow had Cherokee heritage. The Department agrees with mother that this finding is not supported by substantial evidence. We concur. Both mother and father—in written filings and on the record—informed the court that they had Cherokee heritage. The Department subsequently confirmed mother's claim of Cherokee heritage. To be sure, the juvenile court at one point observed that it had previously found that mother's other children did not have American Indian heritage. But this observation did not obviate the need to notify the Cherokee tribe because (1) Willow had a different father than mother's other children, and Willow's father indicated Cherokee heritage, and (2) the juvenile court itself did not appear to consider its prior finding conclusive because it simultaneously ordered the Department to investigate mother's claim of Cherokee heritage (but never followed up on its order).

For these reasons, the juvenile court violated its duty to notify the Cherokee tribe under ICWA. We are therefore compelled to conditionally remand this matter: The juvenile court is ordered to give notice to the Cherokee tribe while leaving all remaining orders intact unless and until the tribe determines that Willow is an "Indian child" and is therefore invited to

participate in the proceedings. (*Hunter W.*, *supra*, 200 Cal.App.4th at p. 1467.)

DISPOSITION

The juvenile court's orders are conditionally affirmed. The matter is remanded to the juvenile court for full compliance with the inquiry and notice provisions of ICWA and related California law.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.